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NO. 92-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERNON O. HOLLAND, AND
JAMES DAVIS DRANE MAULDIN, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution bars retrial of Holland and Mauldin on Counts Two through Five because trial would twice place them in jeopardy for the **same conduct** that constitutes an offense disposed of by the judgment of dismissal with prejudice as to Count One.

More specifically, the issue is whether the **conduct** charged in Counts Two through Five is the **same conduct** alleged as "overt acts" and "means and methods" of the conspiracy to defraud the United States, 18 USC Section 371, used to prove the conspiratorial agreement alleged in Count One, thereby barring retrial of those Counts because of the judgment of dismissal on the merits as to Count One. *United States v. Felix*, ___ U.S. ___ (1992); *Grady v. Corbin*, 109 L.Ed.2d 548, 110 S.Ct. 2084 (1990). See also *Abney v. U.S.*, 431 U.S. 651 (1977), 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977); *Richardson v. United States*, 468 U.S. 317, 82 L.Ed.2d 242, 104 S.Ct. 3081 (1984).

The conduct alleged to establish a crime pursuant to the defraud clause of the conspiracy statute is the same conduct that constitutes the offenses in the remaining counts of the indictment for which Holland and Mauldin have already been prosecuted and acquitted. The conduct alleged in Counts Two through Five is inextricably bound to the conspiracy charge under the defraud clause of 18 U.S.C. Section 371. This issue was impliedly reserved by the *Felix* Court.

All parties to the instant case are in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Vernon O. Holland and James D.D. Mauldin, Jr., hereby petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion affirming the decision of the United States District Court for the Northern District of Oklahoma was entered on February 13, 1992, and was published; see *United States v. Holland, et al.*, ____ F.2d ____, (10th Cir. 1992). Petition for rehearing *en banc* was timely filed, but was denied on March 30, 1992. The opinion of the Court of Appeals appears in the Appendix hereto at -1-.

The opinion of the United States District Court from which appeal was taken to the Court of Appeals was not published. That opinion of the District Court appears in the Appendix hereto at -9-.

JURISDICTION

The judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Tenth Circuit on March 30, 1992. The jurisdiction of this Court regarding this petition is established pursuant to Title 28, U.S. Code, section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> ...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

STATEMENT OF THE CASE

On February 8, 1990, a federal grand jury sitting in the Northern District of Oklahoma returned a five (5) count indictment against both Holland and Mauldin. Count One of the Indictment charged Holland and Mauldin with a *Klein* type conspiracy under the "defraud clause" of 18 U.S.C. Section 371. Count One generally alleged that both Defendants had conspired to impede and impair the lawful functions of the Internal Revenue Service in the "ascertainment, computation, assessment and collection of revenue, to wit: the personal income taxes" of the two Defendants, unindicted coconspirators and others. The conspiracy was alleged to have begun on or about January 1, 1983, and ended on or about August 31, 1988, and acts in furtherance thereof took place "in the Northern District of Oklahoma, and elsewhere...."

Count One of the original indictment included a section entitled "Means of the Conspiracy," alleging:

> The defendants established and maintained an interest bearing account in the Cayman Islands, British West Indies, which was used to conceal funds derived from their domestic banking operation and to earn interest income for themselves and certain of their members, the existence of which, and the income from which, were never reported to the United States government.

The "Overt Acts" section of the original indictment set forth:

> 3. At various times, beginning in 1983 and continuing until at least December 1987, defendant HOLLAND, defendant JAMES DAVIS DRANE MAULDIN, JR. (MAULDIN) and Kevin Duffy O'Brien (O'Brien), utilized at least five commercial

banks in Tulsa, Oklahoma, and at least one foreign account to deposit the funds of FEA members, to disburse currency, and to pay bills for themselves and FEA members.

15. In 1984, defendant HOLLAND traveled to the Cayman Islands where he opened a bank account for FEA.

19. On or about November 4, 1987, defendant MAULDIN sent a letter to an Internal Revenue Service employee, Barbara Pritchard, advising Pritchard that defendant HOLLAND did not receive any income from FEA.

Count Two of the original indictment avers:

On or about November 4, 1987, in the Northern District of Oklahoma, JAMES DAVIS DRANE MAULDIN, Jr., defendant herein, knowingly and willfully did make, and did cause to be made, a false, fictitious, and fraudulent statement and representation of a material fact in a matter within the jurisdiction of the Internal Revenue Service ... in that the defendant stated and represented in a letter, submitted to the Internal Revenue Service, that VERNON HOLLAND did not receive wages, salary, or other income from FREEMAN EDUCATION ASSOCIATION, whereas defendant then knew that such statement and representation was false...

Counts Three, Four and Five of the original indictment charge:

Between April 15 ... and June 30 ... in the

> Northern District of Oklahoma, defendant VERNON O. HOLLAND did knowingly and willfully fail to report on Internal Revenue Service Federal Income Tax Form 1040 and/or on a Report of Foreign Bank and Financial Accounts Treasury Form 90-22.1, his financial interest in, or signature or other authority over, a foreign bank account held in the name of FREEMAN EDUCATION ASSOCIATION during calendar year [1985, 1986 and 1987] at the Washington International Bank and Trust, Ltd., Grand Cayman, British West Indies, a Cayman Islands, BWI bank institution....

After the submission, argument and denial of a variety of pre-trial motions, the first trial of this case commenced on August 23, 1990; the jury received the case for deliberation on September 15, 1990, and three days later, that jury reported back to the Court that it was deadlocked, and could return no verdict on any of the counts of the indictment. On September 18, 1990, the District Court declared a mistrial over objections by both Holland and Mauldin.

On October 4, 1990, the prosecution filed a Superseding Indictment that was virtually indistinguishable from the original indictment. Count 1 of the Superseding Indictment again charges a conspiracy under the "defraud clause" of 18 U.S.C. Section 371. It was changed only in immaterial respects as stated below. While the prosecution took the opportunity to amend the conspiracy count of the Superseding Indictment to conform the alleged conspirators' conduct to the proof of such conduct submitted at the first trial, the allegations contained in Counts 2, 3, 4 and 5 of the original indictment were incorporated verbatim into the same counts of the Superseding Indictment.

All of the conduct alleged in Count Two of the Superseding Indictment is also alleged in Count One, as follows:

From on or about January 1, 1983, until on or about August 31, 1988, in the Northern District of Oklahoma, and elsewhere, Vernon Oliver Holland and James Davis Drane Mauldin, Jr., did knowingly and intentionally combine, conspire, confederate and agree together ... to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of revenue, to wit: The personal income taxes of Vernon Oliver Holland, James Davis Drane Mauldin, Jr. ....

* * *

A. OBJECTS OF THE CONSPIRACY

1. That the defendants would knowingly and willfully establish and maintain an organization, the FREEMAN EDUCATION ASSOCIATION (FEA), through which, by various means including the operation of a "warehouse bank," they facilitated the willful non-compliance with the tax laws of the United States by themselves and by customers;

* * *

B. MEANS OF THE CONSPIRACY

2. The defendants knowingly and willfully operated a private banking business ("warehouse bank") through the FREEMAN EDUCATION ASSOCIATION, and conducted financial transactions designed to

conceal the sources and disbursement of funds ... from the Internal Revenue Service....

* * *

C. OVERT ACTS

16. On or about November 4, 1987, defendant MAULDIN sent a letter to an Internal Revenue Service employee, Barbara Pritchard, advising Pritchard that defendant HOLLAND did not receive any income from FEA.

In addition to the conduct alleged in the first paragraph of the Superseding Indictment quoted above—relevant to Counts Three, Four and Five—Count One also alleged in pertinent part:

* * *

3. MEANS OF THE CONSPIRACY

1. The defendants knowingly and willfully failed to file federal income tax returns ("Internal Revenue Service Federal Income Tax Form 1040" in Counts Three, Four and Five)....

* * *

3. Defendant HOLLAND secretly established and maintained an interest-bearing account in a foreign country, namely the Cayman Islands, British West Indies....

* * *

C. OVERT ACTS

> 2. At various times ... Defendant HOLLAND ... utilized ... at least one foreign account to deposit the funds of FEA customers, to disburse currency, and to pay bills for themselves and FEA customers.
>
> * * *
>
> 11. In August 1984, defendant HOLLAND traveled to a foreign country, namely, the Cayman Islands.
>
> 12. In January 1985, in order to take advantage of the bank secrecy laws of that foreign country, defendant HOLLAND established a bank account for certain FEA customers in the Cayman Islands.

In response to the Superseding Indictment, Holland and Mauldin filed their supplemental motion for bill of particulars, with points and authorities on December 28, 1990. The government's response and brief in response was filed January 16, 1991. The government's pleading stated: "they have, now, the benefit of the government's entire evidence and case on this subject."

During a pre-trial conference held on February 11, 1991, trial on the Superseding Indictment was set for July 22, 1991. On July 16, 1991, the prosecution moved pursuant to Rule 48(a), F.R.Crim.P., to dismiss Count 1 of the Superseding Indictment "in the interest of justice." In response, on July 22, 1991, Holland and Mauldin filed an objection to a dismissal without prejudice.

During a hearing before the District Court on July 23, 1991, the prosecution informed the District Court that it had no objection to the dismissal of Count 1 with prejudice. Immediately thereafter defendants moved the District Court to dismiss Counts Two through Five of the su-

perseding indictment pursuant to the *Grady* double jeopardy rule which bars a retrial for the same conduct previously prosecuted and adjudicated on the merits.

The District Court then asked the government whether it agreed that the gravamen of the offenses in Counts Three, Four and Five was Holland's establishment and maintenance of the foreign bank account and his failure to report it. The government agreed.

The July 23, 1991 hearing ended with the District Court instructing both parties to submit briefs on the double jeopardy issue. Holland and Mauldin filed an amended motion to dismiss the remaining counts of the indictment based on the *Grady* double jeopardy rule on July 24, 1991. In that motion, Holland and Mauldin asserted that the conspiracy count of the Superseding Indictment alleged the same conduct as express "overt acts" and "means and methods" of the conspiracy which was the subject of Counts 2 through 5.

The prosecution responded to Holland and Mauldin's motion to dismiss on double jeopardy grounds on July 24, 1991. The government argued that the motion was frivolous on the basis that "jeopardy has never attached." The government further argued that even if "some sort of double jeopardy analysis" were to apply that neither *Grady* nor *Felix* controlled. Finally, the government contended that double jeopardy analysis did not apply because the defendants were "charged with committing one or more illegal acts" — not "conduct." In short, the government argued that the prior jury trial and dismissal with prejudice of Count One were irrelevant. Also included within the government's response was a Rule 404(b) proffer. Holland and Mauldin replied to the government's response on July 25, 1991.

Another hearing was held on July 25, 1991. The District Court determined that jeopardy had attached to Count 1 when the government dismissed same with prejudice. The District Court determined that Holland and Mauldin's double jeopardy plea was not frivolous but overruled the motion. The District Court's Order dismissing the motion was entered July 25, 1991.

In the District Court's Order it determined that [t]he specific acts alleged by the Government in substantive Counts 2, 3, 4, and 5 were variously described in the conspiracy count, Count 1, under the sub-titles Objects Of The Conspiracy, Means Of The Conspiracy and Overt Acts." However, the District Court concluded that:

> ...*Grady* is distinguishable from the present case because in the former the conduct of the defendant was essentially a single act, i.e. driving a vehicle while intoxicated thereby causing a death. Here, the Defendants Holland and Mauldin were accused of many acts in reference to the conspiracy charged in Count 1, and individual specific acts as to substantive Counts 2, 3, 4 and 5. The commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. (Emphasis added).

Holland and Mauldin timely filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. Section 1291.

In the Tenth Circuit, Holland and Mauldin argued that *Grady v. Corbin*, supra, bars retrial on Counts Two through Five because trial would twice place them in jeopardy for the same conduct disposed of by the judgment of dismissal with prejudice as to Count One.

Holland and Mauldin cited several recent decisions regarding the application of the *Grady* test concerning the general conspiracy statute, as in the case at bar. *U.S. v. Felix*, 926 F.2d 1522 (10th Cir. 1991); *U.S. v. Calderone*, 917 F.2d 717 (2nd Cir 1990); *United States v. Gambino*, 920 F.2d 1108 (1990).

Furthermore, Holland and Mauldin argued that a dismissal with prejudice in the criminal context is equivalent to an acquittal for double jeopardy analysis. A dismis-

sal with prejudice has the same meaning regardless of the context—civil or criminal. It is an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause.

After briefly summarizing the procedural history of Holland and Mauldin's appeal, a panel of the Tenth Circuit announced its *ratio decidendi* in the first paragraph of its decision:

> Because defendant's double jeopardy claim lacks the necessary predicate of ***termination of original jeopardy on the substantive counts,*** *Richardson v. United States*, 468 U.S. 317 (1984), we affirm. [Emphasis added].

Later the Tenth Circuit noted the government's undisputed right to re-try defendants after the first trial ended in a hung jury followed by a mistrial and observed:

> ... although defendants do not contest the government's right to retrial, they urge the dismissal with prejudice of ***one of those charges*** in the superseding indictment sets up the double jeopardy bar that taints the entire second prosecution. [Emphasis added].

At page 7, the Tenth Circuit correctly notes that:

> ... defendants rely on the "conduct test" articulated in *Grady*, quoting, "to establish an essential element of an offense charged in that [subsequent] prosecution, the government will prove conduct that constitutes an offense for which the defendant[s] ha[ve] already been prosecuted." *Grady*, 495 U.S. 508, ____, 110 S.Ct. 2084, 2087."

However, in the next sentence the panel declines to address defendants' contention, first referring cryptically to "a false assumption about the effect of a dismissal with prejudice in this case," followed by a *non sequitur* concerning "a fundamental principle of conspiracy jurisprudence." Next, the opinion provides a puzzling digression about the government's reasons for dismissing count one with prejudice before approaching the issue from a different angle:

> ... to construe [dismissal with prejudice] as the equivalent of an acquittal or an adjudication on the merits of all counts simply because Count I incorporated the other four counts as overt acts or means or methods is not the necessary consequence of the dismissal. Nevertheless, ***we hold jeopardy attaches to the dismissal with prejudice of Count I.***
>
> This conclusion, however, does not mandate dismissal of the remaining counts in the superseding indictment. Although defendants were already "prosecuted" for the substantive charges reflected in the superseding indictment, those counts were never resolved for jeopardy purposes because the court declared a mistrial. ***Nor are these counts inextricably bound to the conspiracy charge.***
>
> "A conspiracy is a partnership in crime," *Pinkerton v. United States*, 328 U.S. 640, 644 (1946), with ingredients as well as implications, distinct from the completion of the unlawful project. [Emphasis added].

Pursuant to Rules 35 and 40(a) of the Federal Rules of Appellate Procedure and the corresponding rules of the Tenth Circuit, Holland and Mauldin timely

petitioned for rehearing, with suggestion for *en banc* review. On March 30, 1992, the Tenth Circuit denied the suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This case presents a substantial issue of the application of former jeopardy principles under the Fifth Amendment of the United States Constitution on which this Court in *U.S. v. Felix*, supra, impliedly reserved ruling by limiting its double jeopardy analysis to a "conspiracy to commit an offense" rather than the defraud clause of the general conspiracy statute.

In the instant case, Counts Two through Five were not autonomous from the conspiracy alleged in Count One. Holland and Mauldin were charged under the ***defraud*** clause of the general conspiracy statute. Therefore, the Tenth Circuit erred when it determined that Counts Two through Five were not "inextricably bound to the conspiracy charge."

The *Felix* Court was faced with the necessity of reconciling the longstanding authority of the *Bayer-Pinkerton*[1] line of cases dealing with the distinction between conspiracy to commit an ***offense*** and the offense itself with the language in *Grady*.

The case at bar involves the ***defraud*** clause of 18 U.S.C. Section 371 and not the offense clause.

Addressing the general conspiracy statute, the Sixth Circuit in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), recently stated that:

> The statute is written in the disjunctive in order to criminalize two categories of conduct: conspiracy to commit offenses specifically defined elsewhere in the federal

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[1] *United States v. Bayer*, 331 U.S. 532 (1947); *Pinkerton v. United States*, 328 U.S. 640, 643 (1946).

> criminal code, and conspiracies to defraud the United States. The first category requires reference in the indictment to another criminal statute which defines the object of the conspiracy. The second category, the defraud clause, stands on its own without the need to refer to another statute which defines the crime.
>
> *Minarik*, 875 F.2d at 1186-87.

Holland and Mauldin were confronted with a statute which Congress has left ambiguous since it was first adopted in 1867. However, the original purpose of the defraud clause was to reach conduct not covered elsewhere in the criminal code. As Professor Goldstein has pointed out in his seminal article[2] on the defraud clause, the statute was first adopted when the federal criminal code was in a primitive state. It contained only a handful of substantive crimes, and experience with them was limited.

Thus, the primary purpose of the "defraud" portion of Section 371 was to reach conduct not covered elsewhere in the criminal code, a code which, unlike the present criminal code, had not elaborated specific fraud offenses. Therefore, the *Minarik* Court concluded that:

> In light of later legislation creating numerous specific fraud statutes, the "defraud" portion of the statute should be viewed "as an interim measure protecting the [g]overnment until such time as Congress has been able to deal more specifically with a given problem."
>
> *Minarik*, 875 F.2d at 1194 (quoting Goldstein, 68 Yale L.J. at 450).

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[2] A. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959).

See also *U.S. v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986); *U.S. v. Vazquez*, 319 F.2d 381, 384 (3d Cir. 1963); *U.S. v. Pezzati*, 160 F.Supp. 787, 789 (D.Colo. 1958); *U.S. v. Klein*, 124 F.Supp. 476, 480 (S.D.N.Y. 1954), aff'd on other grounds, 247 F.2d 908 (2d Cir. 1957).

The United States charged Holland and Mauldin with a conspiracy to defraud in order to criminalize all of the conduct alleged in the indictment as "overt acts" and "means and methods" of the conspiracy. All of such conduct was expressly found by the District Court to particularize the conspiracy. Furthermore, the District Court instructed the jury that they must find Holland and Mauldin guilty of the conspiracy if they found them guilty of any of the substantive offenses.

The indictment charged Holland and Mauldin with willfully conspiring "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department of the United States." However, as stated by the Fifth Circuit in *U.S. v. Allred*, 867 F.2d 856, 867 (5th Cir. 1989), a typical section 371 "conspiracy to defraud" indictment includes language indicating that the fraud was perpetrated by active interference with some specific function in a specified manner.

In *U.S. v. Haga*, 821 F.2d 1036, 1040 (5th Cir. 1987), the Court defined the scope of "defraud" prosecutions and held that a criminal prosecution under the "conspiracy to defraud" clause requires a showing of more than completely external interference with the working of a governmental program or disregard for federal laws.

In *U.S. v. Rosenblatt*, 554 F.2d 36, 41-42 (2d Cir. 1977), the Court held that bare allegations of a conspiracy to defraud the United States, without defining the nature of the scheme, is insufficient.

Thus, Holland and Mauldin filed a motion to dismiss the indictment for failure to define the criminal conduct which constituted the offense by particularizing the scheme to defraud.

As determined by the *Rosenblatt* Court:

> We reject the argument that the phrase "conspiracy to defraud the United States" is sufficient, without more, to define the "central" nature of the conspiratorial plan. ... [T]he phrase "conspiracy to defraud the United States" is "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." *Haas v. Henkel*, 216 U.S. 462 (1910). Nevertheless, this breadth, like the breadth of the "offense" clause, merely relates to the types of criminal conduct that may be prosecuted. Its does not eliminate the requirement that there must be an agreement ***as to the same type of conduct***. Both clauses of the conspiracy statute use broad, generic terms which are insufficient, standing alone, to define the "essential nature" of a given conspiratorial plan.
>
> *Rosenblatt*, 554 F.2d at 41. [Emphasis added].

The District Court denied the motion to dismiss by incorporating the "objects of the conspiracy," the "means of the conspiracy" and "overt acts" as the conduct which constituted the criminal offense under the defraud clause.

The *Minarik* Court eloquently elaborated why the District Court in the case at bar incorporated all of the conduct alleged in the conspiracy count to particularize the duty that Holland and Mauldin allegedly breached:

> ... where the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely

> defining those duties takes a conspiracy to avoid them out of the defraud clause of [Section] 371. But compliance with our rule today will mean that ***prosecutors and courts are required to determine and acknowledge exactly what the alleged crime is.*** They may not allow the facts to define the crime through hindsight after the case is over.
>
> *Minarik*, 875 F.2d at 1196.

Holland and Mauldin's double jeopardy claim is expressly within the "same conduct" test established by this Court in *Grady*, i.e., the ***same conduct*** "that constitutes an offense for which the defendant[s] ha[ve] already been prosecuted." *Grady*, 495 U.S. at 521. It is indisputable that Holland and Mauldin were prosecuted for all of the conduct alleged in the indictment which the District Court determined was the conduct which constituted the offense in the instant case.

Therefore, the error of the Tenth Circuit is readily apparent. With due deference to the panel, the dismissal with prejudice at issue here was not confined to merely ***one of the charges***. Instead, the dismissed count charged a conspiracy to ***defraud*** the United States and included all of the ***conduct*** charged as substantive offenses in Counts Two through Five as "overt acts" and "means and methods of the conspiracy" which were inextricably bound to the conspiracy charge. In other words the ***conduct*** for which Holland and Mauldin were prosecuted in the first trial was alleged twice: first, all of the ***conduct*** was alleged as "overt acts" and "means and methods" in furtherance of the conspiracy charged in Count One; second, ***the same conduct*** was charged separately as substantive offenses in Counts Two through Five.

JEOPARDY ATTACHED TO THE CONDUCT ALLEGED IN THE CONSPIRACY COUNT WHEN THE JURY WAS IMPANELED

In a jury trial, jeopardy attaches when the jury is impaneled and sworn. The Supreme Court held in *Crist v. Bretz*, 437 U.S. 28, 35, (1978) that:

> The basic reason for holding that a defendant is put in jeopardy even though the criminal proceeding against him terminates before verdict was perhaps best stated in *Green v. United States*, 355 U.S. 184, 187-188:
>
> > "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."
>
> [This principle is also quoted approvingly in *Grady v. Corbin*, 110 S.Ct. 2084, 2091.]
>
> "Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a jury trial might have been open to argument before

> this Court's decision in *Downum v. United States*, 372 U.S. 734 ... (1963). ... the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is impaneled and sworn."

The Supreme Court has repeatedly reaffirmed this principle. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Burks v. United States*, 437 U.S. 1 (1978); *Richardson v. United States*, 468 U.S. 317 (1984).

Thus, an integral part of the constitutional guarantee against double jeopardy is that jeopardy attaches when the jury is impaneled and sworn — in the instant case on August 23, 1990. Of course, the failure of the jury to reach a verdict and the trial court's declaration of a mistrial following the hung jury was not an event that terminated the original jeopardy. The event which terminated the original jeopardy was the judgment of dismissal with prejudice on the conspiracy count.[3] The District Court's Order dismissing the conspiracy count of the superseding indictment "with prejudice" was entered on July 23, 1991. A judgment of dismissal with prejudice as to all the conduct prosecuted in count one constitutes an acquittal for double jeopardy purposes.

JEOPARDY TERMINATED AS TO THE CONDUCT ALLEGED IN COUNTS ONE THROUGH FIVE WHEN THE TRIAL COURT DISMISSED COUNT ONE WITH PREJUDICE

It is elemental that the term ***dismissal "with prejudice"*** has a well-established meaning in the law. The term signifies that the dismissal is final, that the controversy is concluded and cannot be maintained or reopened. A dismissal with prejudice (1) is a dismissal with prejudice of all charges which could have been brought

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[3] This was expressly determined by the District Court.

against the defendant arising out of the same set of facts that gave rise to the initial complaint or indictment; (2) it is conclusive of the rights of the parties as if the action had been prosecuted to a final adjudication on the merits adverse to the complainant, in this instance the government; (3) it is the same regardless of the context—civil or criminal; and (4) it is ***equivalent to an acquittal*** for double jeopardy claims.

Although only one federal case can be found on the meaning of a dismissal with prejudice in the criminal context—*Spriggs v. United States*, 225 F.2d 865 (9th Cir. 1955)—the respective Supreme Courts of the states have expressly ruled on this issue. See *People v. Cheek*, 337 N.E.2d 330, 333 (Ill. 1983) (dismissal with prejudice has the same meaning regardless of the context civil or criminal, a dismissal with prejudice in the criminal context is equivalent to an acquittal); *Parks v. State*, 397 A.2d 212, 215 (Md. 1979) (dismissal "with prejudice" has been held to be as conclusive of the rights of the parties as if the action had been prosecuted to a final adjudication on the merits adverse to the complainant, in this instance the State).

Therefore, the Tenth Circuit erred when it announced its *ratio decidendi* in the first paragraph of its decision:

> Because defendant's double jeopardy claim lacks the necessary predicate of ***termination of original jeopardy on the substantive counts***, *Richardson v. United States*, 468 U.S. 317 (1984), we affirm. [Emphasis added].

The Tenth Circuit noted the government's undisputed right to re-try Holland and Mauldin after the first trial ended in a hung jury followed by a mistrial and observed:

> ... although defendants do not contest the

> government's right to retrial, they urge the dismissal with prejudice of ***one of those charges*** in the superseding indictment sets up the double jeopardy bar that taints the entire second prosecution. [Emphasis added].

With due deference to the Tenth Circuit, the dismissal with prejudice at issue here was not confined to merely ***one of the charges***. Instead, the dismissed count charged a conspiracy to defraud the United States and included all of the ***conduct*** charged in Counts Two through Five as "overt acts" and "means and methods of the conspiracy."

The criminal ***conduct*** for which Holland and Mauldin were prosecuted in the first trial was alleged twice: first, all of the ***conduct*** was alleged as "overt acts" and "means and methods" of the conspiracy to defraud charged in count one; second, the ***same conduct*** was charged separately as substantive offenses in Counts Two through Five.

UNITED STATES V. MARTIN LINEN SUPPLY CO., 430 U.S. 564 (1977), PROHIBITED THE APPEALS COURT FROM HOLDING THAT THE SUPERSEDING INDICTMENT DOES NOT AMOUNT TO A SUCCESSIVE PROSECUTION

Next, the Tenth Circuit held that this is not a successive prosecution:

> "Because the superseding indictment in this case does not amount to a successive prosecution, and defendants can be separately charged for the remaining offenses, this case falls outside of *Grady's* domain."

This holding constitutes a prohibited departure from binding authority in *United States v. Martin Linen*

Supply Co., 430 U.S. 564 (1977). There, the trial court declared a mistrial due to a jury deadlock. After the mistrial was declared, the trial court entered a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. The United States appealed to the Fifth Circuit pursuant to 28 U.S.C. Section 3731, which allows the United States to appeal a District Court's judgment in a criminal case, except where the Double Jeopardy Clause prohibits further prosecution. The Fifth Circuit dismissed the appeal.

On certiorari to the Supreme Court, the government argued that "[o]nce the district court declared a mistrial and dismissed the jury, any double jeopardy bar to a second trial dissolved." *Martin Linen Supply*, 430 U.S. at 572-76. The Supreme Court rejected the government's argument and held that the Double Jeopardy Clause prohibited further prosecution. *Id.* The Tenth Circuit's decision in the case at bar hinges on the difference between a dismissal with prejudice and a Rule 29 dismissal.

GRADY V. CORBIN REQUIRED THE PANEL TO APPLY THE "SAME CONDUCT" TEST

Grady v. Corbin, 110 S.Ct. 2084 (1990), required the Tenth Circuit to apply the "same conduct" test in its double jeopardy analysis. Throughout the opinion the Tenth Circuit conflates and confuses "termination of original jeopardy on the substantive counts" with termination of jeopardy as to Holland and Mauldin's conduct. It is clear from the following language that the panel applied the wrong test in its analysis by looking to the ***agreement***[4] as opposed to ***the conduct from which the agreement is inferred***: "'[i]t is the agreement, ***separate and apart from the overt act itself***, which comprises the crime'" of conspiracy.

Although such analysis would be correct as applied to a conspiracy to commit an "offense", it is incorrect when

[4] The District Court incorporated all of the conduct alleged in the entirety of Count One to particularize the agreement.

applied to the "defraud" clause in the instant case. In other words, the conduct which constituted the offense for which Holland and Mauldin were prosecuted was the "objects of the conspiracy," "means and methods" and "overt acts" as found by the District Court.

Thus, the Tenth Circuit's decision violates the rule of this Court established in *Grady*. Furthermore, the rationale of the majority in the Court of Appeals below is precisely on point when the defraud clause of the general conspiracy statute is at issue. See e.g., *United States v. Felix*, 926 F.2d 1522 (10th Cir.), cert. granted, 112 S.Ct. 47 (1991) (adopting *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990)).

This "same offense" analysis is one of the tests which the Supreme Court specifically rejected as inadequate in *Grady*. Agreement is the gist of the crime of conspiracy, but, in nearly all conspiracy prosecutions, the government attempts to establish the existence of an illicit agreement by proving ***specific conduct*** from which the jurors can infer the existence of the conspiracy. The Tenth Circuit's decision failed to focus upon the conduct the government charged as "overt acts" and "means and methods" of the conspiracy to defraud which was considered the offense by the District Court in order to particularize the alleged agreement.

Since the government will reprosecute the identical conduct for the substantive Counts Two through Five which it previously prosecuted as "overt acts" and "means and methods" in the conspiracy count, the opinions in *Grady* and its progeny—*Felix, Calderone, and Gambino*—compel dismissal of Counts Two through Five which charge that same conduct.

In *Grady*, the United States Supreme Court held that:

> ... [the] Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove

> conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 110 S.Ct. at 2087.

Thus, this Court in *Grady* prohibited the government's use of previously prosecuted conduct "to establish an essential element" of the offense charged in the second prosecution. *Id.* at 2087.

THE JURY WAS INSTRUCTED THAT COUNTS TWO THROUGH FIVE WERE INEXTRICABLY BOUND TO THE CONSPIRACY TO DEFRAUD

The Tenth Circuit noted in *Felix* that "the government's closing argument expressly emphasized the relevance of the conduct described" as overt acts to "the jury's determination of guilt." *Felix*, 926 F.2d at 1529 n. 7. Likewise, in its closing argument in the instant case on September 13, 1990, the government emphasized the relevance of the conduct alleged as "overt acts" and "means and methods" of the conspiracy as proof of a conspiratorial agreement:

> The major charge in this case, and I told you in the opening statement, is conspiracy to defraud the United States by impairing and impeding the lawful functions of the IRS in the ascertainment, computation, assessment and collection of taxes. And the indictment, which I anticipate the Court will read to you — and I'm not going to go over it all now, but I wish you would listen to it and the charges very carefully as they go through the ***overt acts*** and all the ***means and methods*** that we've alleged occurred in this case. [Emphasis added].
>
> The agreement doesn't really require, I think you will understand after you hear

> the Court's instruction, that the government prove that all these people sat around in a smoke-filled room around a table and said okay, this is what we're going to do, or sign an agreement in blood or anything of that nature. It can be a ***tacit agreement*** and that someone can join it — an ongoing conspiracy to violate the law can be joined — such as the government submits Mr. Mauldin joined and then participated in afterwards in 1986. [Emphasis added].
>
> As long as we show that two or more people, including the defendants, joined in this ***tacit understanding*** of what the purposes were, the illegal purposes were in the organization, in the conspiracy, I submit to you that that is the conspiracy. You're never going to have a case, usually, where you have someone who says, yeah, we all sat around and we sat and mapped out that we were going to do this, that or the other illegally and planned it out and we all signed the agreement or agreed to put our hands in the middle or joined hands around the table. That, I submit to you, isn't required for a conspiracy. [Emphasis added].

Throughout the government's closing argument, the overt acts and means of the conspiracy were repeatedly recited as proof of the conspiratorial agreement supposedly leading "to the jury's determination of guilt." The government then explained to the jurors that they should specifically consider Holland's and Mauldin's ***conduct charged in the substantive counts as proof of the conspiracy charge*** as well:

> I'm going to go on with the conspiracy. But

> ***the other counts*** I think ***will fall in here*** as I go through the evidence because most of the counts ***are listed as overt acts in the conspiracy*** because ***we allege they were all done in furtherance of the general plan of the conspiracy***, which was to impair and impede the IRS in the lawful functions of the IRS in collecting taxes and assessing them. [Emphasis added].

The District Court also instructed the jury that "the evidence need not show that the members entered into any express or formal agreement." The District Court instructed that the conspiratorial agreement need only be proven by the alleged conspirators' ***conduct***, which the government could prove by establishing that "***one or more of the means or methods described in the indictment*** was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy." Specifically, the jury received the following instructions on agreement:

> Thus a conspiracy is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist of the offense is a combination or ***agreement*** to violate or disregard the law.
>
> . . .
>
> However, the ***evidence need not show that the members entered into any express or formal agreement***, or that they directly — by words spoken or in writing — stated between themselves what their object or purpose was to be, or the details thereof, or ***the means by which the object or purpose was to be achieved***. What the evidence must show, in order to ***establish proof that a conspiracy existed***, is that

> the members ***in some way or manner***, or through some contrivance, positively or ***tacitly*** came to a mutual understanding to try to accomplish a common and unlawful plan.
>
> It is not necessary for the prosecution to prove that all the ***means or methods set forth in the indictment*** were agreed upon to carry out the conspiracy, or that all such ***means, methods***, or ***overt acts*** were actually used or put into operation. It is, however, necessary that the evidence establish to the satisfaction of the jury that ***one or more of the means or methods described in the indictment*** was agreed upon to be used in an effort to ***effect or accomplish some object or purpose*** of the conspiracy as charged in the indictment. [Emphasis added].

This instruction requiring proof of only "... one ... of the means or methods described in the indictment [a direct and specific reference to CONDUCT]..." expressly instructs the jury that it must find defendants guilty of the conspiracy alleged in Count One if it found them guilty on any one of Counts Two through Five.

The District Court further instructed the jury that proof of membership in a conspiracy "must be established by evidence as to the defendant's own ***conduct***":

> Before a jury may find that a defendant — or any other person — has become a member of a conspiracy, the evidence must show that the conspiracy was formed and that the defendant — or other person who is claimed to have been a member — knowingly and willfully participated in the unlawful

plan with the intent to ***advance or further some objective or purpose*** of the conspiracy.

One who knowingly and willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy, that some of the participants remained with the enterprise from its inception until it was brought to an end, and others joined or left the scheme as it went along, is of no consequence if each knew he was part of a ***larger ongoing conspiracy***.

In determining whether or not a defendant — or any other person — was a member of a conspiracy, the jury is not to consider what others may have said or done. That is to say, the membership of a defendant — or any other person — in a conspiracy ***must be established by evidence as to the defendant's own conduct***. [Emphasis added].

CONCLUSION

Because one, the petitioners have already been prosecuted pursuant to Count One for all of the conduct alleged therein; two, Count One has been dismissed with prejudice; three, Count Two, Three, Four and Five alleged no more than the same conduct previously prosecuted and dismissed with prejudice pursuant to Count One, this Court should issue its Writ of Certiorari to review and reverse the Court of Appeals for the Tenth Circuit, thereby preventing re-prosecution of petitioners in violation of the Double Jeopardy Clause of the Fifth Amendment.

Respectfully submitted this 28th day of June, 1992.

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 91-5111

VERNON O. HOLLAND and
JAMES DAVIS DRANE MAULDIN, JR.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Oklahoma.
The Honorable Thomas R. Brett
(No. 90-CR-010-B.)

Decided: February 13, 1992

Before HOLLOWAY, MOORE, AND BRORBY,
Circuit Judges.

Affirmed

COUNSEL

Kenneth P. Snoke, Assistant United States Attorney, (Tony M. Graham, United States Attorney, with him on the briefs) Tulsa, Oklahoma, for Plaintiff-Appellee.

William A. Cohan, Cohan & Greene, Encinitas, California, (Lowell H. Becraft, Jr., Huntsville, Alabama, and James D. Williams, Tulsa, Oklahoma, with him on the briefs) for Defendants-Appellants.

OPINION

This interlocutory appeal asks whether *Grady v. Corbin*, 495 U.S. 508 (1990), bars a second prosecution for certain violations of the Internal Revenue Code after defendants, first trial on similar charges ended in a mistrial. Vernon O. Holland and James Davis Drane Mauldin, Jr., hinge their double jeopardy claim to the government's dismissal, with prejudice, of a charge of conspiracy to defraud under 18 U.S.C. § 371 shortly before retrial. Defendants then contended jeopardy necessarily tainted the remaining substantive counts previously charged as overt acts and prohibited their separate reprosecution. Holding *Grady* was distinguishable, the district court denied defendants' motions to dismiss but held *Abney v. United States*, 431 U.S. 651 (1977), permitted this appeal. Because defendants' double jeopardy claim lacks the necessary predicate of termination of original jeopardy on the substantive counts, *Richardson v. United States*, 468 U.S. 317 (1984), we affirm.

I.

In February 1990, a federal grand jury charged defendants with conspiracy to defraud the United States Government under 18 U.S.C. § 371. Count I alleged defendants conspired to impede and impair the lawful function of the IRS in ascertaining, computing, assessing, and collecting personal income taxes from defendants.

To this end, defendants allegedly established and operated a "warehouse bank" in Tulsa, Oklahoma, called the National Currency Exchange, which later became the Freeman Education Association. Through this vehicle, defendants allegedly handled cash transactions designed to evade IRS reporting requirements. Allegedly, an interest-bearing account in the Cayman Islands, British West Indies, was a repository for the concealed funds in the domestic operations. In the first indictment (Holland I), Count I included a description of the means of

accomplishing the conspiracy and set forth twenty overt acts evidencing the existence of the conspiracy. Count II charged defendant Mauldin with sending the IRS a letter stating defendant Holland received no wages, salary, or other income from the Freeman Education Association, a statement he knew was false in violation of 18 U.S.C. § 1001.[1] Count III charged defendant Holland with knowingly and willfully failing to report income on IRS Form 1040 and/or on a Report of Foreign Bank and Financial Accounts Treasury Form 90-22.1, his financial interest in or signature authority over a foreign bank account held in the name of the Freeman Education Association in violation of 31 U.S.C. § 5314 and 5322(b) and 31 C.F.R. § 103.24. Count IV charged defendant Ho11and with knowingly and willfully failing to report income on Income Tax Form 1040 and/or on a Report of Foreign Bank and Financial Accounts Treasury Form 90-22 in violation of 31 U.S.C. § 5314 and 5322(b) and 31 C.F.R. § 103.24. Count V charged defendant Holland with willful failure to disclose his financial interest in or signature authority over a foreign bank account in violation of 31 U.S.C. § 5314 and 5322(b). Counts III, IV, and V were also alleged to have been committed while violating 18 U.S.C. § 371.

After a three-week trial, the jury was unable to reach a verdict on any of the five counts. The district court stated it granted the mistrial because of "'manifest necessity'" and because a mistrial was "the only means by which the 'ends of public justice' could be fulfilled", citing *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165 (1824). The court stated it would set the matter for retrial unless the government did not plan to retry the case.[2]

Subsequently, the government filed a superseding indictment (Holland II) on October 4, 1990. Holland II

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[1] The Court gave a modified Allen charge on September 17, 1990.

[2] 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

essentially mirrored Holland I upon which defendants had already been tried. One week before defendants' retrial was scheduled to begin, the government moved to dismiss Count I, § 371 conspiracy, representing it acted of in the interest of justice" under Fed. R. Crim. P. 48(a). Defendants did not contest the government's motion provided Count I was dismissed with prejudice. The government readily agreed to this disposition. Count I thus eliminated,[3] defendants moved to dismiss the indictment on the ground the Double Jeopardy Clause of the Fifth Amendment barred reprosecution of charges explicitly incorporated in Count I.

II.

Before the district court, defendants contended each remaining count only narrowed the focus on an alleged act, for example, failure to report income, "but the greater includes the lesser, and the greater is alleged as an overt act in furtherance of the conspiracy, namely that he failed to file a 1040 at all so we're talking about the same conduct." R. IX, 10. Under *Grady*, defendants urged, the same conduct the government dismissed with prejudice would then be used to reprosecute them on the remaining charges. This argument is elaborated on appeal with reference to the jury instructions given in the first trial[4] and reliance on post-*Grady* cases, *United States v. Felix*, 926 F.2d 1522 (10th Cir.), cert. granted, 112 S. Ct. 47 (1991); *United States v. Calderone*, 917 F.2d 717 (2d

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3 Justice Scalia's strong dissent contends that *Blockburger* "is not just a guide to legislative intent but rather an exclusive definition of the term "same offense" in the Double Jeopardy Clause." *Id.* at fn. 8, page 2091.

4 For example, defendants cite the jury instruction on "'Conspiracy' - Defined, " which states in part:

It is not necessary for the prosecution to prove that all the means or methods set forth in the indictment were agreed upon to carry out the conspiracy, or that all such means, methods, or

Cir. 1990); and *United States v. Gambino*, 920 F.2d 1108 (2d Cir. 1990), cert. denied, 112 S. Ct. 54 (1991). The government distinguishes *Grady* as a single transaction, successive prosecution case while this case is a "continuing prosecution." Relying on *Richardson v. United States*, 468 U.S. 317, the government insists because jeopardy never attached after the first mistrial and the, dismissal with prejudice does not amount to an adjudication on the merits, the continuing prosecution of defendants is not barred by double jeopardy.

III.

The Supreme Court furnishes our starting point in holding "the failure of the jury to reach a verdict is not an event which terminates jeopardy." *Id.* at 325. The Court reasoned:

> The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no. valid double jeopardy claim to prevent his retrial. *Id.*

Therefore, the government could properly re-indict and re-try defendants on the same charges without offending principles of double jeopardy because the required event, such as an acquittal, did not occur to terminate the original jeopardy on the counts remaining for retrial.

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overt acts were actually used or put into operation. It is, however, necessary that the evidence establish to the satisfaction of the jury that one or more of the means or methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment.

(defendants' emphasis added). Appellants' Appendix at 69.

Reindictment, in the circumstances of this case, is equivalent to retrial under the original indictment.

Nevertheless, although defendants do not contest the government's right to retrial, they urge the dismissal with prejudice of one of those charges in the superseding indictment sets up the double jeopardy bar that taints the entire second prosecution. To reach this result, defendants rely on the "conduct test" articulated in *Grady*, quoting, "to establish an essential element of an, offense charged in that [subsequent] prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. 508, __, 110 S. Ct. 2084, 2087.

Not only is this contention supported by a false assumption about the effect of the dismissal with prejudice in this case, but also it overlooks a fundamental principle of conspiracy jurisprudence. First, we have no record other than the government's representations at oral argument about its reasons for dismissing Count I.[5] In fact, the district court did not inquire before granting the Rule 48(a) motion about "the prosecutor's reasons for dismissing the indictment and the factual basis for the prosecutor's decision." *United States v. Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988) (citing *United States v, Derr*, 726 F.2d 617, 619 (10th Cir. 1984)). By agreeing to dismiss Count I with prejudice, the government inadvertently achieved the remedial purposes of Rule 48(a). However, to construe this result as the equivalent of an acquittal or an adjudication on the merits of all counts simply because Count I incorporated the other four counts as overt acts or means or methods is not the necessary consequence of the dismissal. Nevertheless, we hold jeopardy attaches to the dismissal with prejudice of Count I. *Derr*, 726 F.2d at 619.

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[5] The government represented at oral argument the conspiracy count was dismissed to cut down on the length of the scheduled trial and the amount of evidence it intended to introduce.

This conclusion, however, does not mandate dismissal of the remaining counts in the superseding indictment. Although defendants were already "prosecuted" for the substantive charges reflected in the superseding indictment, those counts were never resolved for jeopardy purposes because the court declared a mistrial. Nor are these counts inextricably bound to the conspiracy charge.

"A conspiracy; is a partnership in crime," *Pinkerton v. United States*, 328 U.S. 640, 644 (1946), with "ingredients, as well as implications, distinct from the completion of the unlawful project." *Id.* (citations omitted). It is the agreement, separate and apart from the overt act itself, which comprises the crime. "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Id.*[6] Pinkerton recognized certain limited exceptions to this principle. For example, when the agreement of two actors is necessary to the completion of the substantive crime, "there is no ingredient in the conspiracy which is not present in the completed crime." *Id.* However, none of the substantive crimes remaining in the superseding indictment fit these exceptions.

Consequently, prosecution of the substantive crimes charged in the superseding indictment does not offend the third concern in double jeopardy analysis.

> '[The Double Jeopardy Clause] protects against a second prosecution for the same offense after acquittal. it protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'

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6 *Pinkerton*, in fact, affirmed the vicarious liability of one coconspirator for the substantive acts committed by his brother.

Grady, 110 S. Ct. at 2090, quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Because the superseding indictment in this case does not amount to a successive prosecution, and defendants can be separately charged for the remaining offenses, this case falls outside of *Grady's* domain. Defendants' double jeopardy claim is therefore unfounded, and we **AFFIRM** the district court's denial of the motion.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

v. No. 90-CR-10-B

VERNON 0. HOLLAND,
JAMES DAVIS DRANE MAULDIN, JR.,
Defendants.

ORDER

The Court has before it for consideration the Motion to Dismiss, filed by Defendants Vernon 0. Holland and James Davis Drane Mauldin, Jr., all remaining Counts of the Superseding Indictment based upon the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The case was previously tried to a jury on a previous indictment on August 23, 1990, through September 18, 1990, the jury retiring to deliberate on September 13, 1990 (approximately 15 actual trial days). After three and one-half days of jury deliberation,[1] and the Court having been advised on numerous occasions the jury was hopelessly deadlocked, the Court granted a mis-trial and set the matter down for a jury trial subsequently. The record reflects that termination of the trial by mistrial was justified by a"manifest necessity" or was the only means by which the "ends of public justice" could be fulfilled. *United States v. Perez*, 22 U.S. 579, 6 L.Ed. 165 (1824). The Court considered and exhausted all other possibilities to ensure

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[1] The court gave a modified *Allen* charge on September 17, 1990.

that the defendants received the full protection of the Double Jeopardy Clause. The court concluded there was no other alternative to declaring a mistrial as all alternatives had been canvassed. *Dunkerley v. Hogan*, 579 F2d. 141 (2nd. Cir. 1978); *United States v. Grasso*, 552 F.2d 46 (2nd Cir. 1977); *United States v. Tinney*, 473 F.2d 1085 (3rd Cir. 1973) cert. den. 412 U.S. 928, 93 S.Ct. 2752, 37 L.Ed.2d 156 (1973). *United States v. McKoy,* 591 F.2d 218 (3rd Cir. 1979); *Drayton v. Haves*, 589 F.2d 117 (2nd. Cir. 1979).

The Court concludes the instant prosecution does not violate the Double Jeopardy Clause by reason of the Court's granting of a mis-trial previously herein as aforesaid.

The Superseding Indictment, filed herein on October 4, 1990, charges both Defendants, in Count 1, with conspiring to defraud the United States by impeding and obstructing the lawful functions of the Internal Revenue service in the ascertainment, computation, assessment and collection of revenue, to-wit: the personal income taxes of these defendants, unindicted co-conspirator Kevin Duffy O'Brien and others, in violation of 18 U.S.C. § 371. Count 2 charges Defendant Mauldin with a substantive charge of making a false statement of a material fact in a matter within the jurisdiction of the Internal Revenue service, in violation of 18 U.S.C. § 1001. Counts 3,4 and 5 charge Defendant Holland with willfully failing to disclose a financial interest in or signature authority over a foreign bank account for the tax reporting periods April 15 to June 30, for the years 1986, 1987 and 1988, respectively, in violation of 31 U.S.C. §§ 5314 and 5322(b).

The specific acts alleged by the Government in substantive Counts 2, 3, 4, and 5 were variously described in the conspiracy count,

Count 1, under the sub-titles Objects Of The Conspiracy, Means Of The Conspiracy and Overt Acts.

Relying essentially upon *Grady v. Corbin*, __ U.S. __, 110 S.Ct. 2084, (1990), Defendants urge they cannot be prosecuted for the events described in Counts 2 through 5 because that same conduct was the basis of the charge in the conspiracy count, Count 1.

In *Grady* the defendant (Corbin), while intoxicated, drove his vehicle across the double yellow line of Route 55 in LaGrange, New York, striking two oncoming vehicles. An Assistant District Attorney was called to the scene where he learned that two occupants of the second vehicle to be struck were seriously injured, one of whom died that evening. The same evening Defendant was served with two uniform traffic tickets, charging him with misdemeanors driving while intoxicated and failing to keep right of the median. Defendant's blood alcohol level was nearly twice the level at which it is per se illegal to operate a motor vehicle in New York.

After Corbin pled guilty to the two traffic tickets, a grand jury, two months later, charged Corbin with reckless manslaughter, second-degree vehicular manslaughter, and criminally negligent homicide for causing the death of the second car's occupant. Following a series of appeals the New York Court of Appeals prohibited the prosecution of driving while intoxicated counts pursuant to that state's double jeopardy provision and further ruled that prosecution of the two vehicular manslaughter counts would violate the Double Jeopardy Clause of the Fifth Amendment.

The United States Supreme Court, in a 5/4 decision, affirmed.

The *Grady* Court, after first applying the *Blockburger*[2] test to determine whether the offenses had identical statutory elements or that one is a lesser included offense of the other, which would immediately bar subsequent

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2 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932).

prosecution, concluded that satisfying this test does not end the inquiry. The Court stated:

". . . The Double Jeopardy Clause embodies three protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). *Id.* at 2090.

The Court went on to note the *Blockburger* test was developed "in the context of multiple punishments imposed in a single prosecution", *Id.* at 2091, and does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.[3]

In the present case Defendants contend the instant prosecution is for the same conduct as that described, variously, under the now dismissed (with prejudice) Count 1; therefore, *Grady* requires dismissal of the remaining counts on double jeopardy grounds. The Court disagrees. The crime charged (and since dismissed) in Count 1 is significantly different that the substantive counts charged in counts 2, 3, 4 and 5. The court concludes Defendants could have been convicted of the crime charged in Count 1, despite the evidence offered by the Government, if any, as to Counts 2-5 being found by a jury totally insufficient to convict. Conversely, a jury could have found Defendants guilty of Counts 2-5, all or any, without finding guilt as to Count 1.

The Court concludes *Grady* is distinguishable from the

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[3] Justice Scalia's strong dissent contends that *Blockburger* "is not just a guide to legislative intent, but rather an exclusinve definition of the term "same offense" in the Double Jeopardy Clause." *Id* at fn. 8, page 2091.

present case because in the former the conduct of the defendant was essentially a single act, i.e. driving a vehicle while intoxicated thereby causing a death. Here, the Defendants Holland and Mauldin were accused of many acts in reference to the conspiracy charged in Count 1, and individual specific acts as to substantive Counts 2, 3, 4 and 5. The commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. *Pereira v. U.S.*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed.435 (1954); It has long been the law that the act or acts which consummate a conspiracy by fulfilling the "overt act" requirement may also be the subject of charged substantive count(s) without violation of the Double Jeopardy Clause of the Fifth Amendment. *U.S. v. Phillips*, 664 F.2d 971 (11th Cir. 1981) cert. den. 102 S.Ct. 2965, 457 U.S. 1136, 73 L.Ed.2d 1354, cert. den. 103 S.Ct. 208, 459 U.S. 906, 74 L.Ed.2d 166.

The present prosecution is also distinguishable from *U.S. v. Felix*, 926 F.2d 1522 (10th Cir. 1991), wherein a divided panel concluded a prior Missouri conviction on a single count of attempt to manufacture methamphetamine barred, under the double jeopardy theory, prosecution of the same defendant in Oklahoma for conspiracy, manufacturing and possessing with intent to distribute methamphetamines, possessing precursor chemicals and maintaining a place for manufacturing methamphetamine inasmuch as the counts in the Oklahoma indictment were based on proof of the same conduct involving the same actors and overlapping time frames. The Court finds *Felix* factually inapposite.

The Court further finds *United States v. Derr,* 726 F.2d 617 (10th Cir. 1984) distinguishable. In *Derr* the Government "moved to dismiss for the purpose of continuing the further investigation into the matter." *Id.* at 619. The dismissal sought by the Government was not with prejudice, thereby ending all future prosecution on the crime(s)

charged in that indictment. Rather it sought dismissal for the purpose of continuing its investigation in anticipation of further prosecution. In the present case the Count 1 conspiracy charge is gone forever. In *Derr* the Government sought to retreat so as to perhaps fight another day. In the present case the Government agreed to the dismissal with prejudice. In *Derr* the Government opposed it.

The Court concludes Defendants' Motion To Dismiss, based upon grounds of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution should be and the same is hereby DENIED.

Pursuant to the Court's dismissal of Count 1 with prejudice, it is further ordered the superseding Indictment is herewith amended to delete from Counts 3, 4, and 5 the following:

> ". . . and which failure to report was committed while violating another law of the United states, to wit: 18 U.S.C. § 371, conspiracy to Defraud the United States, as set forth in Count One of this Indictment,"

and further amended to insert "Title 31, United States Code, Sections 5314 and 5322(a)" in place of Title 31, United States Code Sections 5314 and 5322(b) at the end of each Counts 3, 4, and 5.

IT IS SO ORDERED this 25th day of July, 1991.

/s/
Thomas R. Brett
United States District Judge